Filed 4/8/19 P. v. Ocampo CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BRYAN OCAMPO, Defendant and Appellant.	G054958 (Super. Ct. No. 11ZF0114) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

J. Courtney Shevelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Steve Oetting and Daniel J. Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

This appeal concerns a homicide case involving two teenage boys from rival tagging crews who fought behind a junior high school. Although there were many witnesses, no one was sure who threw the first punch. The jury found 18-year-old Bryan Ocampo guilty of stabbing to death 12-year-old Juan Martinez, rejecting three separate defense theories, (1) self-defense, (2) voluntary manslaughter based on imperfect self-defense, and (3) voluntary manslaughter based on heat of passion. Ocampo's sole contention on appeal is whether the trial court committed reversible error by including a bracketed sentence found in the imperfect self-defense instruction (CALCRIM No. 571), which informed the jury the defense does not apply when "the defendant, through his own wrongful conduct, has created circumstances that justify his adversary's use of force." We find no error and affirm the judgment.

FACTS

Ocampo was a member of a tagging crew known as "Downtown Anaheim" or DTA. Martinez, a seventh grader attending junior high school, was in a tagging crew known as "Sky's The Limit" or STL. Ocampo was six years older, five inches taller, and 65 pounds heavier than Martinez.

As Martinez and his friends exited the junior high school campus to start summer break, Ocampo approached them, yelling out the name of his tagging crew and cursing at them. He questioned the group of junior high school students, who were wearing school uniforms about what crew they were from. Ocampo asked Martinez "do you write." Martinez replied by stating the name of his tagging crew and his moniker, "R2." This exchange took place with the two taggers standing face to face on the sidewalk.

After much cursing, a fistfight ensued, during which Ocampo produced a knife and stabbed Martinez three times, saying "die, die, die." As Martinez ran away, Ocampo followed him a short distance yelling, "Where are you going?" Ocampo then fled the scene. Martinez bled to death on the other side of the street.

An information charged Ocampo with one count of murder (Pen. Code, § 187, subd. (a)), and alleged he used a knife to kill the victim (Pen. Code, § 12022, subd. (b)(1)). The trial lasted approximately one month, during which several witnesses were called to testify. The jury convicted Ocampo of second degree murder and found the knife allegation true. The court sentenced him to 15 years to life for the murder plus a consecutive one-year determinate term for the knife use allegation.

We will limit our discussion of the witness's testimony to those facts relevant to the single issue raised on appeal, i.e., was there sufficient evidence of Ocampo's "wrongful conduct" to warrant including the bracketed portion of the imperfect self-defense jury instruction.

N.R. (Witness 1)

Witness 1, an eighth grader the day of the incident, exited her school through the back gate with her two friends, C.S. and A.G. (Witness 2). As she walked away from the school, she saw Ocampo with two girls walking towards the school. She recognized one of the girls as E.A. (Witness 3). As they passed each other on the sidewalk, she heard C.S. ask, "Oh, what's going on?" The other girl (later identified as J.A.) replied, "Oh, there is going to be a fight." When Witness 1 and her friends heard this statement, they stopped and turned to look back at the school gate. Witness 1 said, "That's when everything started happening."

When asked to elaborate, Witness 1 explained she saw Ocampo had "pinned" Martinez against the gate, they were fighting, and Ocampo had pulled out a knife and stabbed Martinez. From her viewpoint, she could see Ocampo swinging his arms, but she did not see if any punches connected with Martinez. She could not really see what Martinez was doing. She saw Ocampo was suddenly holding a knife, but she did not see where he got it. She then witnessed the stabbing, during which there was "a lot of screaming, and I heard [Ocampo] saying 'die'" repeatedly. She described his tone as being angry. She did not hear Martinez say anything but saw him pushing to get away.

Once Martinez managed to escape, Witness 1 heard Ocampo yell, "'Where are you going?'"

On cross-examination, Witness 1 stated she did not remember asking if J.A. was going to get in a fight, and only heard there was going to be a fight. Defense counsel asked Witness 1 to review statements she made to the police soon after the incident (five years prior). Witness 1 then agreed C.S. asked J.A., "'Are you going to get down,'" meaning get in a fight. J.A. replied "yes" and that is when the group turned to look at what was taking place at the school gate between Ocampo and Martinez. Witness 1 testified she observed the entire altercation but she did not hear what the boys said to each other, did not see who threw the first punch, and did not witness any hits to the face. She estimated the fight lasted less than five seconds before Ocampo brought out the knife.

A.G. (Witness 2)

Witness 2, a seventh grader the day of the incident, viewed the fight from a similar vantage point as Witness 1. She corroborated Witness 1's story with only a few minor differences. For example, she thought Witness 1, rather than C.S. asked if there was going to be a fight. When the group turned to look back at the school gate, Witness 2 saw Ocampo and Martinez fighting. She recalled they were punching each other, but she could not remember who threw the first punch. Witness 2 testified Ocampo was punching Martinez's upper body but Martinez's conduct looked more as if he was trying to block the blows. Like Witness 1, she did not hear them exchange words, but recalled Ocampo was yelling the word "die" repeatedly during the fight. She also heard Ocampo screaming, "die" as he chased Martinez into the street.

E.A. (Witness 3)

Witness 3 knew Ocampo because he was friends with her older brother. She had skipped school the day of the incident to spend time with J.A. Together they went to a newly opened store near the junior high school, they telephoned Ocampo, and

they arranged to meet him. During the telephone conversation, Ocampo told Witness 3 to stay away from the school because he was going to get in a fight and he did not want her to see him fighting. Witness 3 decided she wanted to see the fight and ignored Ocampo's warning.

Witness 3 and J.A. met with Ocampo, and during their conversation he stated he was going to fight "'the kid from'" the rival STL crew. As Ocampo walked towards the school, Witness 3 and J.A. walked a few feet behind him. Witness 3 saw a group of boys and girls wearing school uniforms and then heard Ocampo yell the name of his tagging crew while looking at a group of boys. He was cursing and yelled "DTA" and his moniker "Moto." Witness 3 heard Ocampo ask Martinez if "he writes." Martinez yelled the name of his tagging crew and his moniker. Witness 3 recalled Ocampo and Martinez started pushing and punching each other "in the face" with closed fists. At trial, she did not remember who threw the first punch. However, before the grand jury she testified Martinez hit first.

Witness 3 recalled the entire fight took place in the middle of the sidewalk, and Martinez was not pinned against a fence. She also never saw Ocampo holding a knife. After the fight, Witness 3 and J.A. walked through the school campus. She spoke on her phone with Ocampo, and he told her not to tell anybody she was there or what happened. Later, Ocampo sent Witness 3 a text message repeating his admonition not to talk about the incident with anybody. Two minutes later, he sent a second text message telling Witness 3 she did not know him or anything and to delete all text messages. Witness 3 complied but the police obtained copies of the messages from her cell phone carrier.

G.B. (Witness 4)

Witness 4 lived in an apartment building near the school campus. As he stood on a balcony overlooking the street, he saw "all of a sudden there was a fight, a fast fight." He saw a "big guy" follow another younger male into the street with a knife in his

hand. He heard voices and struggling but could not see any physical contact because tree branches obstructed his view.

Ocampo

Ocampo stated he joined DTA when he was a high school freshman because he wanted to be with other artists. His moniker was initially "Dank" but he changed it to "Moto" after being arrested. He acknowledged DTA did not get along with certain tagging crews, and it was impossible to tell what crew a person belongs to by what they look like; you have to ask.

Ocampo maintained violence was not common in a tagging crew, but he experienced more assaults after joining DTA. When he attended high school, STL crew members twice assaulted him. He did not report these attacks to the police.

Ocampo believed STL members traveled in groups. He knew they had weapons, and "small" STL members were more concerning than older taggers because they were more reckless. He began carrying a weapon after he was robbed by gang members one night. They had tried to stab him and had punched him. He was 17 years old at the time.

He explained "hit-ups" were done to find out if someone was a friend or an enemy, and this happened everyplace he went. The question, "Do you write?" was a common "hit-up" for taggers. If the tagger was a rival, he may get attacked. Ocampo admitted he did not always say where he was from and sometimes "hit-ups" started fights. He claimed he would not use his knife in that situation. He clarified he once pulled his knife when he was hit-up from a group and they had issues with him. The group stopped bothering him when he showed them his knife.

Ocampo stated he was 18 years old on the day of the incident. That morning, he got up late because he was feeling the ill effects of Xanax, marijuana, and cocaine from the night before. He called Witness 3 in the afternoon, and she mentioned there was going to be a fight between two girls. Ocampo wanted to see the fight because

he thought it would be entertaining. He denied telling Witness 3 he was going to get in a fight that day.

After Ocampo met with Witness 3 and J.A., they did not discuss a fight because he was not going to fight. In his pocket, Ocampo was carrying a small fold-out knife, which had a three or four inch blade.

When they arrived at the junior high school, Ocampo recalled seeing a group of three to five boys. He stated they looked rowdy, like they wanted to do something. One of the boys was Martinez, but Ocampo had never seen him before. Because of the way the group was acting, Ocampo believed they might not be people he got along with and he did not know if they were rivals. As the group came closer to him, Ocampo wanted to find out if they were people he got along with, and he asked, "What's up?"

Ocampo said he got hit-up in response by Martinez, who asked if he wrote. Ocampo responded in what he believed was a normal tone, "If I write, do you write?" Martinez replied, "STL" in a raised voice. When Ocampo retorted "DTA," Martinez hit him. Ocampo decided he could not walk away because the group was looking at him and he was concerned that retreating could lead to other problems. Believing he had no other option, he started fighting back.

Ocampo maintained Martinez hit him a few times before he punched back. He could hear the people, who were standing in a circle around the fight, yelling "STL," "get that fool," and "fuck him up." Although he was punching Martinez, Ocampo was concerned about the entire group and thought they would all eventually jump in and attack. For this reason, he panicked and pulled out his knife. He thought the mere appearance of a knife would stop the fight, but Martinez kept hitting him. He moved the blade in a forward, not downward motion, hoping to scare Martinez. Martinez did not stop after Ocampo swiped the knife two times. On the third knife swing, Martinez ran away. Ocampo did not see any blood, and he was unsure if his knife had made contact.

Ocampo admitted he followed Martinez part way into the street. He explained he wanted to see if Martinez was leaving. He did not recall saying anything during the fight, and denied repeating the word "die." He did not see blood on the knife until after he was running away from the school. He threw the knife away because he knew he was going to get into trouble.

After going home, Ocampo returned to the school and saw the crowd, police, and police tape. He realized something bad had happened and decided to text Witness 3, asking her to delete his prior text messages. He sent other text messages and posted on social media information trying to exculpate himself.

The police arrested Ocampo later that evening. Initially, he denied being involved in the stabbing, but changed his story when the detective confronted him about the text messages to Witness 3. Ocampo told the police he did not intend to do anything bad and Martinez swung at him first. He maintained the knife was intended to scare Martinez and he used it for protection. Ocampo stated he thought the knife did not hurt Martinez. Ocampo denied their tagging crews had problems and said he knew Martinez was from a tagging crew because he had been previously pointed out. Ocampo believed he had only stabbed Martinez one time, not three.

DISCUSSION

One of Ocampo's defense theories was that he was guilty of voluntary manslaughter because he acted in imperfect self-defense. His sole argument on appeal challenges the trial court's instruction on this defense. Specifically, he maintains that although the jury instruction contained correct statements of law, one paragraph did not apply to the facts of this case and should not have been considered by the jury.

It is error to give an instruction that is correct, but irrelevant or inapplicable, i.e., not supported by substantial evidence. (*People v. Marshall* (1997) 15 Cal.4th 1, 39-40 ["'unsupported theories should not be presented to the jury'"].) "Substantial evidence is evidence that would allow a reasonable jury to find the existence

of facts underlying the instruction, and to find the defendant guilty beyond a reasonable doubt based on the theory of guilt set forth in the instruction. [Citations.] In making this determination, we view the evidence most favorably to the judgment presuming the existence of every fact that reasonably may be deduced from the record in support of the judgment." (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1290.) "'The error of instruction on an inapplicable legal theory is reviewed under the reasonable probability standard of [*People v. Watson* (1956) 46 Cal.2d 818, 836].' [Citation.]" (*People v. Debose* (2014) 59 Cal.4th 177, 205-206.)

The court instructed the jury using CALCRIM No. 571 as a guide. The court instructed on the first three paragraphs of the pattern instruction as follows: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense.

"If you conclude the defendant acted in complete self-defense, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable.

"The defendant acted in imperfect self-defense if:

"1. The defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury; [¶] AND

"2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; [¶] BUT

"3. At least one of those beliefs was unreasonable.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

"In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant." (CALCRIM No. 571.)

Ocampo asserts that to this point, the instruction was unobjectionable. The alleged error arose from the court decision to include an optional bracketed paragraph listed in the pattern instruction.

The jury was instructed on the following bracketed paragraphs:

"A danger is *imminent* if, when the fatal wound occurred, the danger actually existed or the defendant believed it existed. The danger must seem immediate and present, so that it must be instantly dealt with. It may not be merely prospective or in the near future.

"*Imperfect self-defense does not apply when the defendant, through his own wrongful conduct, has created circumstances that justify his adversary's use of force.*

"If you find that . . . Martinez or other persons threatened or harmed the defendant in the past, you may consider that information in evaluating the defendant's beliefs.

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder." (CALCRIM No. 571, italics added.)

The italicized sentence is the focus of Ocampo's appeal. He notes CALCRIM No. 571 offers limited guidance as to when all the bracketed paragraphs should be used. With respect to the italicized paragraph above, the instruction's notes stated, "Imperfect Self-Defense May be Available When Defendant Set in Motion Chain of Events Leading to Victim's Attack, but Not When Victim was Legally Justified in Resorting to Self-Defense. (Citing, *People v. Enraca* (2012) 53 Cal.4th 735, 761; *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179-1180.)" (CALCRIM No. 571.)

Ocampo argues these two cases illustrate perfectly how the trial court erred in this case. In *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179-1180 (*Vasquez*), the appellate court determined the trial court's refusal to instruct on imperfect self-defense was prejudicial error. In that case, defendant asked the victim to join him and some friends in an alley, where he accused the victim of raping his deceased younger brother. Defendant pulled out a gun and shot the victim, after the victim lunged at him and began to choke him. (*Id.* at pp. 1177-1178.) The trial court determined defendant was the initial aggressor and created the need to defend himself, and therefore, he was not entitled to an instruction on imperfect self-defense.[1] (*Id.* at p. 1178.)

The appellate court disagreed, holding, "Imperfect self-defense does not apply if a defendant's conduct creates circumstances where the victim is *legally* justified in resorting to self-defense against the defendant. [Citation.] But the defense is available when the victim's use of force against the defendant is unlawful, even when the defendant set in motion the chain of events that led the victim to attack the defendant." (*Vasquez*, *supra*, 136 Cal.App.4th at pp. 1179-1180.) The court reasoned defendant may have been "up to no good" but the victim "used unlawful force first" and, therefore, defendant was entitled to assert imperfect self-defense. (*Id.* at p. 1180.)

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[1] The court in *Vasquez* gave an alternate reason for refusing to give the instruction. It stated that as a factual matter defendant did not believe he was in imminent peril because there was nothing in the record (defendant's confession, statement, or the physical evidence) suggesting defendant felt he was in danger. (*Vasquez*, *supra*, 136 Cal.App.4th at pp. 1179-1180.) The court added, "'How could he have felt imminent harm when he's holding a gun and someone is approaching him with their hands?'" (*Id.* at p. 1178.) Ocampo incorrectly focused on this afterthought, and not the lack of evidence in the record, being the reason for the trial court's refusal to give defendant the instruction. In any event, the appellate court determined it was the jury's role to determine defendant's state of mind because there was evidence he was being violently attacked and choked by the victim. "[A] defendant claiming imperfect self-defense will *always* have had the means to rebuff the victim's attack, or else the homicide would not have occurred." (*Id.* at p. 1179.)

The court in *Vasquez,* found instructive *People v. Randle* (2005) 35 Cal.4th 987 (*Randle*), overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1201. (*Vasquez, supra,* 136 Cal.App.4th at pp. 1179-1180.) In the *Randle* case, defendant and his accomplice were stealing stereo equipment from a car when its owner and his cousin confronted them. (*Randle, supra,* 35 Cal.4th at p. 991.) The two men chased the two car thieves as they fled the scene, but caught the accomplice and began to severely beat him. Defendant pulled out his gun and killed one of the men to save his accomplice from serious injury or death. (*Id.* at p. 992.) The Supreme Court determined defendant was entitled to a jury instruction on imperfect defense of another. (*Id* at p. 993.) The *Vasquez* court found the circumstances comparable to the case before it. It reasoned that although the *Randle* defendant was committing a crime, and set in motion the circumstances that led the victim to attack, the evidence suggested in that case, and the case before it, that "the victims, not the defendants, used unlawful force first." (*Vasquez, supra,* 136 Cal.App.4th at p. 1180.)

We conclude *Vasquez* (and *Randle*) are distinguishable because the error related to the trial court's refusal to instruct the jury on imperfect self-defense. Here, the jury was given the instruction and had the opportunity to decide if Ocampo actually believed there was a need to defend himself, and the jury determined that he did not. Given the inconsistent testimony regarding what happened that day, it was a question of fact whether Martinez used *unlawful force* against Ocampo to the degree that a reasonable jury could infer Ocampo honestly believed he needed to stab Martinez three times to defend himself.

Ocampo asserts the Supreme Court in *People v. Enraca* (2012) 53 Cal.4th 735 (*Enraca*), clarified "imperfect self-defense only is unavailable to a defendant if the victim was *legally* justified in resorting to self-defense." He asserts the court held a victim is legally justified only if the defendant was the one who "first initiated a physical attack." We interpret the holding of this case differently.

We begin by reviewing the underlying facts of the *Enraca* case. Defendant shot three people during a gang fight. (*Enraca, supra,* 53 Cal.4th at p. 741.) Hours before the shooting, the victims had clashed with a "group of Asians" after an illegal streetcar race and at a pizza parlor. (*Ibid.*) One of the victims, Dedrick Gobert, later approached the Asian group, who had been chanting words associated with the Bloods gang. Gobert "insulted" them by making hand signs indicating he was a member of a known rival gang (Crips) and by addressing the group with words associated with only Crips members (saying, "'What's up, cuz?'"). (*Ibid.*) The group of Asians attacked Gobert, by throwing him to the ground and beating him. (*Id.* at p. 742.) The victim's two friends, Ignacio Hernandez and Maile Gilleres, attempted to shield Gobert with their bodies. During this encounter, defendant and his associates claimed they thought they saw Gobert reaching for a gun and asserted this was the reason why they knocked him to the ground. (*Id.* at p. 743.)

Defendant confessed he saw Hernandez was shielding Gobert and that he grabbed Hernandez by the hair, pulled his head back, and asked him where he was from. (*Enraca, supra,* 53 Cal.4th at p. 744.) When Hernandez hit defendant's hand, defendant shot him. (*Ibid.*) Defendant fired a second shot when he saw Hernandez move his body. Defendant stated he was afraid Hernandez was going to shoot him with Gobert's gun. (*Ibid.*) When defendant heard Gobert cursing, defendant shot him next, believing he would grab the gun. Defendant then fired his gun in the direction of the victims' female friend, who had pushed defendant and looked like she was about to hit him. The bullet hit her neck, paralyzing her from the chest down. (*Id.* at p. 742.) Defendant claimed he initially intended to break up the fight by shooting the gun in the air. (*Id.* at p. 744.) He admitted he never saw Gobert's gun. (*Ibid.*)

The issue before the *Enraca* court was whether there was a factual basis for instructing the jury that the doctrines of self-defense and imperfect self-defense "cannot be invoked by a defendant whose own wrongful conduct created the circumstances in

which the adversary's attack was legally justified." (*Enraca, supra,* 53 Cal.4th at p. 761.) It explained the two defenses were "'intertwined'" and cannot be "'"invoked by a defendant who, through his own wrongful conduct (*e.g., the initiation of a physical attack or the commission of a felony*), has created circumstances under which his adversary's attack or pursuit is legally justified.'"" (*Id.* at p. 761, italics added.) The Supreme Court noted both sides requested the instructions and the Attorney General was asserting the doctrine of invited error barred defendant from challenging instructions he requested. (*Id.* at p. 761.)

The Supreme Court's entire ruling on this instructional issue was the following: "Here, whether or not defendant made such a choice, the instructions were clearly supported by the record. When Gobert appeared to reach for a gun, the ABC gang attacked him, threw him to the ground, and beat him. Hernandez tried to shield Gobert with his body. Holding his gun in one hand, defendant grabbed Hernandez by the hair, pulled his head back, and asked him where he was from. Hernandez hit his hand, and defendant shot him. Hernandez moved and defendant shot him again. Defendant claimed he fired because he was afraid Hernandez was about to shoot him. This is scant evidence for this claim, but, even if it were true, defendant had attacked Hernandez as he tried to shield Gobert. Defendant could claim neither perfect nor imperfect self-defense in the shooting of Gobert. Once defendant shot Hernandez, Gobert would have reasonably believed he would be shot next." (*Enraca*, *supra*, 53 Cal.4th at pp. 761-762.)

In summary, although the facts were somewhat disputed, there was sufficient evidence suggesting defendant (assisted by many associates) *was the first* to initiate a physical attack upon Gobert. (*Enraca, supra,* 53 Cal.4th at pp. 761-762.) Accordingly, there was evidence that warranted inclusion of the bracketed paragraph regarding "wrongful conduct" in the jury instructions. (*Id.* at p. 761.)

Ocampo uses the *Enraca* case to support his theory the phrase "wrongful conduct" used in the bracketed portion of the instruction is limited to the following two

situations: (1) defendant initiated a physical attack; or (2) the commission of a felony. He points out there was no evidence he threw the first punch, and offensive words would not be legal justification for Martinez's physical aggression. But Ocampo has not accurately described the holding of the *Enraca* case. The court did not rule there could only be two manifestations of "wrongful conduct." It clearly offered *examples* of circumstances when a defendant cannot invoke the defenses of self-defense or imperfect self-defense. (*Enraca, supra,* 53 Cal.4th at p. 761 [defenses cannot be """"invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical attack or the commission of a felony),""" created circumstances making victim's attack legally justified].)

Here, the trial court needed to decide whether there was evidence suggesting Martinez's actions that day could have been a legally justified response to Ocampo's words and conduct. Ocampo contends his verbal "hit-up" was "provocative," but not "in the same way that the accusation of rape [spoken by] the defendant in *Vasquez*" set into motion the chain of events that led the victim to unlawfully attack the defendant. However, he does not explain why his words were less volatile than a rape allegation. Ocampo also maintains evidence proving he may have "anticipated a fight did not add anything that gave Martinez the *legal* justification to initiate the use of force against [him] by throwing the first punch." He argues just because a defendant is "up to no good" is not a reason to "take imperfect self-defense off the table."

In the context of gang culture, particular words are very powerful and hold unique significance in that domain. (See, e.g., *Enraca, supra,* 53 Cal.4th at p. 741.) "[T]here are certain words in our society which when directly communicated to a person under certain circumstances will in fact provoke an immediate violent reaction." (*In re John V.* (1985) 167 Cal.App.3d 761, 769 [upholding constitutionality of Penal Code section 415, subdivision (3), making it a misdemeanor to use offensive words in public place which are inherently likely to provoke immediate violence].)

Moreover, evidence of verbal threats and taunts can be admissible to support a claim of self-defense. (See CALCRIM No. 917; Pen. Code, §§ 692, 693, and 694 [define when assault is justifiable and not a crime].) Provocation by offensive words is not a defense to assault or battery crimes, *unless* the person "spoke or acted in a way" that conveyed a threat of immediate harm. (CALCRIM No. 917.)[2]

In this case, there was evidence Ocampo's words and actions before the fistfight conveyed an immediate threat of harm. Expert witnesses in other criminal cases have confirmed that verbal hit-ups "usually result in some kind of violence 'at the minimum, a fistfight.'" (*People v. Ramirez* (2015) 233 Cal.App.4th 940, 956.) In the *Enraca* case, the victim's taunting words "'What's up, cuz?'" immediately triggered a violent reaction from rival gang members. (*Enraca*, *supra*, 53 Cal.4th at p. 741.) Ocampo was aware of the volatile nature of hitting up, and testified he understood that initiating this particular verbal confrontation could result in violence. At trial, Ocampo explained "hit-ups" were used to challenge a response from an potential adversary, to distinguish friends from enemies. He acknowledged that if the person targeted for a hit-up accepted the challenge by identifying himself as a rival, Ocampo would sometimes initiate a fight. Ocampo did not suggest he was surprised when his actions and words led to mutual combat with Martinez. In addition, there was evidence Ocampo developed the mindset of fighting a STL member at the school gates, and his words and actions that day achieved this desired result. There was ample evidence Ocampo was the initial aggressor who spoke and acted with clear intention of provoking a violent reaction from a hated rival.

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[2] CALCRIM No. 917 provides the following: "Words, no matter how offensive, and acts that are not threatening, are not enough to justify an assault or battery. [¶] [However, if you conclude that <insert name> spoke or acted in a way that threatened [defendant] with immediate harm [or an unlawful touching]/ [or] great bodily injury . . .], you may consider that evidence in deciding whether [defendant] acted in (self-defense/ [or] defense of others).]"

We consider the hypothetical scenario in which Ocampo and Martinez's brawl was broken up before Ocampo pulled the knife, and Martinez was arrested for battery for throwing the first blow. Evidence of Ocampo's cussing, taunts, menacing actions, and verbal challenges would have been admissible to support Martinez's claim of self-defense. A jury may conclude Martinez had legal justification in defending himself against a perceived threat of immediate harm. And, as it turned out in this case, 12-year-old Martinez had good reason to fear for his life after being approached by an adult, who was five inches taller and 65 pounds heavier than him, hitting him up by asking if he writes, cursing at him, and shouting the name of his rival tagging crew and moniker.

Accordingly, we conclude there was sufficient evidence to support giving the bracketed portion of the instruction to the jury. While the facts were in dispute regarding what led to the confrontation, there was evidence to support the theory Ocampo was the initial aggressor who made Martinez feel immediately threatened and his response may have been legally justified. If the jury decided Ocampo was not the initial aggressor, and the "own wrongful conduct" principle therefore did not apply, the jury could disregard it. The trial court instructed the jury, "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I'm suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." We assume the jury understood and complied with those instructions. (*People v. Thornton* (2007) 41 Cal.4th 391, 441.)

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.